

## Internal Revenue Service

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### LEGEND:

Taxpayer =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

a =

\$b =

c =

d =

\$e =

\$f =

\$g =

Agreements =

Common Stock =

Preferred Stock =

Entity X =

Distributions 1 =

Distributions 2 =

Distributions 3 =

Dear :

This letter responds to your authorized representative's letter dated March 13, 2008, which requests rulings on the application of section 382(l)(3)(C) to Taxpayer's transactions. Additional information was received in a letter dated August 20, 2008. The material information submitted for consideration is summarized below.

## SUMMARY OF FACTS

Taxpayer is a parent of an affiliated group that files a consolidated return for federal income tax purposes. Taxpayer and the other members of the consolidated group own, directly and indirectly, interests in various partnerships. As of Date 1, the consolidated group was a loss group within the meaning of Treas. Reg. § 1.1502-91(c).

On Date 2, Taxpayer had a shares of Common Stock issued and outstanding. The Common Stock per share market price at the close of Date 2 was \$b. Prior to Date 2, Taxpayer had only Common Stock issued and outstanding. On Date 2, pursuant to Agreements, Taxpayer issued c shares of Preferred stock to Entity X, no shareholder of which had a five-percent or greater indirect interest in Taxpayer. Also on Date 2, Taxpayer issued d shares of Preferred Stock to certain persons, each of which had a less-than-five-percent interest in Taxpayer. The Preferred Stock is convertible into Common Stock, has an aggregate liquidation preference of \$e, and is mandatorily redeemable on Date 3 (a date after Date 4), in cash, common stock, or a combination thereof (at Taxpayer's option).

The value of the common stock and preferred stock on Date 2 was \$f and \$g, respectively. Following Date 2, Taxpayer's Common Stock declined in value relative to the value of its Preferred Stock. As a result, the Preferred Shareholders' percentage of the outstanding equity value increased relative to the Common Shareholders' percentage of the outstanding equity value. On Date 4, Taxpayer filed a petition with the bankruptcy court for relief under Chapter 11 of the United States Code.

During the period beginning on Date 2 and ending on Date 4 ("Analysis Period"), various testing dates (within the meaning of Treas. Reg. § 1.382-2(a)(4)) arose as a result of the following transactions: (1) the acquisitions of Common Stock by five-percent shareholders; (2) the sales of Common Stock by five-percent shareholders; (3) the issuances of Common Stock to directors and employees through the exercise of options; (4) the Date 2 issuance of Preferred Stock; and (5) the Date 5 issuance of stock in an entity that owned Common Stock. Because shares of the Preferred Stock were not publicly traded, Taxpayer has estimated the value of the Preferred Stock on testing dates during the Analysis Period.

## REPRESENTATIONS

The following representations have been made in connection with the rulings requested:

- (a) Taxpayer's only classes of outstanding stock were the Common Stock and the Preferred Stock.
- (b) No shares of Taxpayer's Common Stock or Preferred Stock were redeemed.
- (c) The Preferred Stock did not meet the definition of stock described in section 1504(a)(4). Accordingly, the Preferred Stock constitutes stock for section 382 purposes.
- (d) Taxpayer did not make any distributions to shareholders.
- (e) With respect to each partnership owned (whether or not wholly-owned) directly or indirectly by Taxpayer and the other consolidated group members, Taxpayer represents that during the Analysis Period: (a) no activity was conducted, or transaction entered into or completed, that was not pursuant to its ordinary course of business; (b) there were no changes in, or modifications to, the allocation of income, deduction, gain, loss or profits; (c) except for Distributions 1, Distributions 2, and Distributions 3, there were no distributions of property (either pro rata or in redemption of a partnership interest); and (d) no other action or event occurred that had a disproportionate effect on the value of an interest held by Taxpayer or the other consolidated group members.

## RULINGS

Based solely on the information submitted and the representations made, we hold that for purposes of factoring out changes in proportionate ownership of Taxpayer's stock which are attributable solely to fluctuations in the relative fair market values of different classes of stock under section 382(l)(3)(C), Taxpayer may apply the following principles during the testing period that includes the Date 2 issuance of Preferred Stock:

On any testing date, in determining the ownership percentage of any 5% shareholder, the value of such shareholder's stock, relative to the value of all other stock of Taxpayer, shall be considered to remain constant since the date that shareholder acquired the stock; and the value of such shareholder's stock relative to the value of all other stock of Taxpayer issued subsequent to such acquisition date shall also be considered to remain constant since that subsequent date.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed on whether the consolidated group was a loss group (within the meaning of Treas. Reg. § 1.1502-91(c)) as of Date 1, or whether Taxpayer experienced an ownership change before, during, or after the Analysis Period. Further, in the event that any shareholder acquired stock prior to the beginning of the testing period, no opinion is expressed regarding whether the principle described above should apply to factor out the effect of fluctuations in value of such stock relative to the value of stock that occur prior to the testing period.

The rulings contained in this letter are based on the information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Although this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only the Taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant.

Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

Sincerely,

*Alfred C. Bishop*

Alfred C. Bishop  
Branch Chief, Branch 6  
Office of Associate Chief Counsel  
(Corporate)

cc: